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2                   UNITED STATES DISTRICT COURT  
3                   EASTERN DISTRICT OF WASHINGTON

4  
5                   UNITED STATES OF AMERICA,

No. CR-09-0156-FVS-4

6                   Plaintiff,

7                   ORDER DENYING PETITIONER'S  
8                   SECTION 2255 MOTION

v.

9                   DANIEL BETANCOURT,

10                  Defendant.

11  
12                  **THIS MATTER** comes before the Court without oral argument based  
13 upon Petitioner's motion under 28 U.S.C. § 2255 to vacate, set aside,  
14 or correct sentence by a person in federal custody. Petitioner is  
15 proceeding pro se. Respondent is represented by Timothy J. Ohms.

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17                  **BACKGROUND**

18                  On November 4, 2009, a Grand Jury returned an Indictment  
19 charging Petitioner with Conspiracy to Manufacture More than 1,000  
20 Marijuana Plants (Count 1), Possession with Intent to Distribute  
21 Marijuana (Count 2), Possession of a Firearm in Furtherance of a Drug  
22 Trafficking Crime (Count 4) and Unlawful Alien in Possession of a  
23 Firearm (Count 5). (ECF No. 1). On July 8, 2010, a jury found  
24 Defendant guilty on Counts 2, 4 and 5 and acquitted Defendant on  
25 Count 1. (ECF Nos. 446, 448, 450 & 452). On December 22, 2010, the  
26 Court sentenced Petitioner to a term of 20 months on Count 2 to run

1 concurrent with a term of 20 months on Count 5. The Court also  
2 sentenced Petitioner to a term of 60 months on Count 4, to run  
3 consecutive to Counts 2 and 5. Judgment was entered on December 22,  
4 2010. (ECF No. 610).

5 Petitioner filed a notice of appeal on December 29, 2010. (ECF  
6 No. 618). On April 28, 2011, Petitioner voluntarily dismissed his  
7 direct appeal. (ECF No. 683). An Amended Judgment was entered on  
8 August 12, 2011. (ECF No. 768). On April 16, 2012, Petitioner  
9 submitted a motion to vacate, set aside, or correct his sentence  
10 pursuant to 28 U.S.C. § 2255. (ECF No. 787). Respondent filed a  
11 timely response on June 4, 2012. (ECF No. 794). Petitioner's reply  
12 brief was received by the Court on June 25, 2012. (ECF No. 795).

13 **LEGAL STANDARD**

14 28 U.S.C. § 2255 provides, in part:

15 A prisoner in custody under sentence of a court established by  
16 Act of Congress claiming the right to be released upon the  
17 ground that the sentence was imposed in violation of the  
Constitution or laws of the United States, or that the court was  
without jurisdiction to impose such sentence, or that the  
sentence was in excess of the maximum authorized by law, or is  
otherwise subject to collateral attack, may move the court which  
imposed the sentence to vacate, set aside or correct the  
sentence.

20 A petitioner is entitled to an evidentiary hearing on the motion to  
21 vacate his sentence under 28 U.S.C. § 2255, unless the motions and  
22 the files and records of the case conclusively show that the prisoner  
23 is entitled to no relief. This inquiry necessitates a twofold  
24 analysis: (1) whether Petitioner's allegations specifically delineate  
25 the factual basis of his claim; and, (2) even where the allegations  
are specific, whether the records, files and affidavits are

1 conclusive against the Petitioner. *United States v. Taylor*, 648 F.2d  
2 565, 573 (9th Cir.), cert. denied, 454 U.S. 866 (1981) (internal  
3 quotations, citations and footnote omitted). Because the Court finds  
4 that the evidence is conclusive against Petitioner (see *infra*), the  
5 Court finds that an evidentiary hearing on the motion to vacate is  
6 not necessary in this case.

7 **ISSUES**

8 Petitioner argues that he is entitled to relief pursuant to 28  
9 U.S.C. § 2255 because his trial counsel was ineffective in the  
10 following ways:

- 11 1. Petitioner's trial counsel failed to inform him adequately  
12 about the "benefits and consequences of going to trial versus  
pleading guilty, either with or without a plea agreement."
- 13 2. Petitioner's trial counsel failed to argue at sentencing for  
14 a downward adjustment to his base offense level pursuant to  
U.S.S.G. § 3B1.2 (mitigating role).
- 15 3. Petitioner's trial counsel failed to pursue certain  
sentencing benefits available under the "fast track program."

16 (ECF No. 787).

17 **DISCUSSION**

18 Petitioner alleges that his trial counsel rendered ineffective  
19 assistance during the plea negotiation process and at sentencing.

20 In reviewing a claim of ineffective assistance of counsel, the  
21 Court applies a two-part test: "First, the defendant must show that  
22 counsel's performance was deficient. Second, the defendant must show  
23 that the deficient performance prejudiced the defense." *United*  
*24 States v. Recio*, 371 F.3d 1093, 1109 (9th Cir. 2004) (quoting  
25 *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Under the first  
26 element, the Court must examine "whether counsel's assistance was

1 reasonable considering all the circumstances." *Strickland*, 466 U.S.  
2 at 688. This requires the Court to analyze counsel's performance  
3 with some deference, as "counsel is strongly presumed to have  
4 rendered adequate assistance and made all significant decisions in  
5 the exercise of reasonable professional judgment." *Id.* at 690.  
6 Counsel's performance is not ineffective unless it fails to meet an  
7 objective standard of reasonableness under prevailing professional  
8 norms. *Id.* at 688.

9 Under the second element, it must be shown "that counsel's  
10 errors were so serious as to deprive the defendant of a fair trial."  
11 *Recio*, 371 F.3d at 1109 (quoting *Strickland*, 466 U.S. at 687). "It  
12 is not enough for the defendant to show that the errors had some  
13 conceivable effect on the outcome of the proceeding." *Strickland*,  
14 466 U.S. at 693. Indeed, "[v]irtually every act or omission of  
15 counsel would meet that test, and not every error that conceivably  
16 could have influenced the outcome undermines the reliability of the  
17 result of the proceeding." *Id.* (citation omitted). Rather,  
18 Petitioner "must show that there is a reasonable probability that,  
19 but for counsel's unprofessional errors, the result of the proceeding  
20 would have been different. A reasonable probability is a probability  
21 sufficient to undermine confidence in the outcome." *Id.* at 694.

22 Finally, a court reviewing an ineffective assistance of counsel  
23 claim "need not determine whether counsel's performance was deficient  
24 before examining the prejudice suffered by the defendant as a result  
25 of the alleged deficiencies . . . . If it is easier to dispose of an  
ineffectiveness claim on the ground of lack of sufficient prejudice .

1 . . . that course should be followed." *Pizzuto v. Arave*, 280 F.3d 949,  
2 955 (9th Cir. 2002) (quoting *Strickland*, 466 U.S. at 697).

3 **I. Plea Negotiations**

4 Petitioner contends that his counsel failed to inform him  
5 adequately about the benefits and consequences of going to trial  
6 versus pleading guilty. (ECF No. 787 at 5). Petitioner alleges that  
7 he was prejudiced because he received a longer sentence than he would  
8 have received by pleading guilty. *Id.*

9 Petitioner does not offer specific allegations concerning any  
10 plea offers that his counsel failed to properly communicate to him,  
11 nor does Petitioner indicate that his counsel failed to inform him of  
12 the status of any plea offers or negotiations. It is thus doubtful  
13 that Petitioner could meet his burden with respect to the first  
14 *Strickland* element.

15 In any event, Petitioner's claim in this regard fails because he  
16 is not able to show that he suffered any prejudice. As indicated by  
17 Respondent, if Defendant had pleaded guilty without a plea agreement,  
18 he would have been subject to a combined minimum sentence of 15  
19 years. (ECF No. 794 at 6). Furthermore, Defendant's counsel recalls  
20 that the best offer provided by the Government during plea  
21 negotiations would have resulted in a sentence of 7.5 years (90  
22 months). *Id.* The Court sentenced Defendant to a total of 80 months  
23 incarceration following his conviction at trial. Because Defendant  
24 received a sentence that is 10 months less than the most favorable  
25 offer extended by the Government, it is apparent that Petitioner  
26 suffered no prejudice by any alleged failure of his counsel during

1 the plea negotiation process. Petitioner's ineffective assistance of  
2 counsel claim in this regard is therefore denied.

3 **II. U.S.S.G. § 3B1.2**

4 Petitioner next argues that he received ineffective assistance  
5 of counsel at sentencing because his counsel failed to argue for a  
6 downward adjustment to his base offense level based on his mitigating  
7 role pursuant to U.S.S.G. § 3B1.2. (ECF No. 787 at 6).

8 As indicated by the Government, Petitioner's argument in this  
9 regard is simply incorrect. (ECF No. 794 at 7-8). Petitioner's  
10 counsel did, in fact, argue that a four-level adjustment pursuant to  
11 U.S.S.G. § 3B1.2 was warranted based on Petitioner's minimal role in  
12 the offense. (ECF No. 521 at 4). Counsel requested that Petitioner  
13 "be given a 4 level reduction in the offense level for being a  
14 minimal participant within the meaning of U.S.S.G. § 3B1.2." *Id.*  
15 Consequently, the Court determines that counsel's performance was not  
16 deficient with respect to this claim.

17 **III. Fast Track Program**

18 Petitioner next alleges he was deprived of constitutionally  
19 effective assistance by his counsel's failure to advise him of  
20 certain sentencing benefits available under the "fast track program."  
21 (ECF No. 787 at 8).

22 Petitioner's argument in this regard is misplaced. The Eastern  
23 District of Washington's fast track program only applies to  
24 defendants charged with a violation of 8 U.S.C. § 1326(a).  
25 Petitioner was not charged with a violation of 8 U.S.C. § 1326(a) in  
26 this case. Since Petitioner was not eligible for the fast track

1 program in this case, defense counsel's failure to advise Petitioner  
2 of this program and its benefits was not deficient, and Petitioner  
3 suffered no resultant prejudice.

4 Petitioner's ineffective assistance of counsel claims are  
5 without merit.

6 **RULING**

7 The Court being fully advised, **IT IS HEREBY ORDERED** that  
8 Petitioner's motion to vacate, set aside, or correct his sentence  
9 pursuant to 28 U.S.C. § 2255 (**ECF No. 787**) is **DENIED**. Because  
10 Petitioner has not made a substantial showing of the denial of a  
11 constitutional right, **the Court declines to issue a certificate of**  
12 **appealability**. 28 U.S.C. § 2253(c).

13 **IT IS SO ORDERED.** The District Court Executive is hereby  
14 directed to enter this order and furnish copies to Petitioner and to  
15 counsel. The District Court Executive is further directed to **CLOSE**  
16 this case as well as the corresponding civil case: **CV-12-0205-FVS**.

17 **DATED** this 10th day of July, 2012.

18 \_\_\_\_\_  
19 S/Fred Van Sickle  
Fred Van Sickle  
20 Senior United States District Judge  
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